United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

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74-2319

To be argued by
STANLEY M. MEYER

United States Court of Appeals
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,

Appellee,

—against—

THOMAS MATTEO,

Defendant-Appellant.

BRIEF ON BEHALF OF APPELLANT

PREMINGER, MEYER & LIGHT
Attorneys for Appellant
66 Court Street
Brooklyn, New York 11201
212 834-8888

STANLEY M. MEYER
of Counsel

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PRELIMINARY STATEMENT

The appellant, THOMAS MATTEO, appeals from a judgment of the United States District Court for the Eastern District of New York (Mishler, Ch. J), rendered on October 4, 1974, after a trial to a jury. Appellant was convicted of Conspiracy to Conceal, Buy and Deal in Narcotics, in violation of 21 U.S.C., Sections 812, 841(a)(1) and 841(b)(1)(A), and sentenced to ten years in prison and special probation of five years. Appellant is at liberty pending this appeal on bail of $75,000.00.

STATUTE

21 U.S.C. Section 841 Prohibited acts A-Unlawful acts

(a) Except as authorized by this subchapter, it shall be unlawful for any person knowingly or intentionally --

(1) to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance; ...

Penalties

(b) Except as otherwise provided in Section 845 of this title, any person who violates subsection (a) of this section shall be sentenced as follows:

(1)(A) In the case of a controlled substance in schedule I or II which is a narcotic drug, such person shall be sentenced to a term of imprisonment of not more than 15 years, a fine of not more than $25,000., or both. If any person commits such a violation after one or more prior convictions of him for an offense punishable under this paragraph, or for a felony under any other provision of this subchapter or subchapter II of this chapter or other law of the United States relating to narcotic drugs, marihuana or depressant or stimulant substances, have become final, such person shall be sentenced to a term of imprisonment of not more than 30 years, a fine of not more than $50,000., or both. Any sentence imposing a term of imprisonment under this paragraph shall, in the absence of such prior conviction, impose a special parole term of at least 3 years in addition to such term of imprisonment and shall, if there was such a prior conviction, impose a special parole term of at least 6 years in addition to such term of imprisonment.

FACTS

Prior to the picking of a jury, a motion was made to suppress statements given in the office of MR. RITCHIE, the Assistant United States Attorney, after appellant had been arrested and brought in for arraignment. The answers given were basically not incriminating anyway, but the Court ruled them admissible since appellant was advised of his rights. (78)* The Court also decided that a point came during the questioning when MATTEO refused to talk any further, apparently because his attorney was in the building, so the interrogation ended and they all proceeded down for the arraignment. At this point, on the way down, appellant supposedly made an incriminating statement to an agent, which was ruled inadmissible because the Court found that MATTEO should have been readvised of his rights by the agent, since he had just indicated an unwillingness to answer further questions.(133A-136A)

The trial began, and the prosecutor told the jury what one witness, JAMES McCORMACK, would be testifying to, although he was already acting up, down in the basement, refusing to take his medication. (130)

The first witness was FRANK J. AGUIAR, an admitted, convicted heroin seller since 1968. His normal source of supply was a fellow named SOMAS, who introduced him to appellant in the Spring of 1968.(136) MATTEO agreed to supply him with uncut merchandise. After that he got

*Numerical references are to pages of the record
References followed with the letter "A" are to pages of appendix

narcotics from MATTEO through SOMAS, who was later replaced by FRANK BREEN. (138-140) In the Fall of 1969, he met with BREEN and MATTEO, who complained that he was short-changed by SOMAS, and thereafter they had another meeting in November, wanting to borrow $16,000.00 from him to go into business. (148-149) AGUIAR gave them the money a few days later and a short time after that they delivered one kilo of heroin to him. (150) He bought three more small packages on a different occasion, when a police raid occurred. They were not arrested because he bribed the police officers, RONALD PETRO and a copy called FREEMAN, with $4,000.00. (153) He also said that all during 1970 until the Summer of 1971, he was picking up various quantities of heroin from the appellant. (159-161) Then AGUIAR put up $33,000.00 and they dealt as partners for six or seven months. (162) They ended their partnership in January, 1971, but continued to deal with each other until April, when he made one purchase of ten kilos for $180,000.00. (163-164) He bought another ten kilos in September, but the witness was arrested himself for selling part of the ten kilos he had gotten from MATTEO. (165) MATTEO owed him $150,000.00. (169)

The following Fall, September of 1972, MATTEO still owed him a lot of money. The witness wanted to go back into narcotics to settle the debt. His brother gave MATTEO $60,000.00 packed in bundles of $10,000.00 each. (174)

Before cross examination, the government put JAMES McCORMACK on the witness stand. He refused to take the oath and complained that he had been assaulted by a LT. COFFEY in West Street, he had been brought

in from a State prison against his wishes and he had been threatened. (9A) The prosecutor applied for a formal grant of immunity which was granted after being explained and the Court also explained the possible contempt consequences in case of a refusal to testify. (20A) The witness said he did not care because he had been threatened and assaulted and he demanded the protection of the Court. (21A-30A) The drama continued, but after the Court said that if he refused to testify a mistrial would not be in order, it was pointed out that the prosecutor in his opening had already told the jury what his testimony would be, even though he already knew McCORMACK would refuse. (31A-32A, 34A-36A).

In the meantime, FRANK AGUIAR went back on the witness stand and was cross examined. He admitted that from 1968 to 1971, he was known as "Jamaica Frank", a street pusher of heroin. (218) He lived with LINDA PIEZELLA, an addict who he supplied with drugs. (226) He paid numerous bribes to members of the police on different occasions, he used to carry a knife, which he occasionally used, and handcuffs, and had a gun possession conviction. He had assaulted prople, and after a heroin selling conviction he began to cooperate with the police. (233-235) However, during the years he cooperated with the Queens District Attorney's office and the police, he never mentioned MATTEO's name (236), even though they had already been dealing for three years. (237)

He read in the papers that MATTEO had been shot five times and that a vast sum of money had been found near the body, so he made a

claim for $250,000.00 of it. (37A-41A) His profits from narcotics from 1968 through 1971 were about $400,000.00, and naturally he is not going to be prosecuted for failure to pay income taxes. (247-248)

McCORMACK then came back and he was granted immunity. (42A-43A) He was then excused to obtain his own attorney. (46A-48A)

The next witness was LINDA PIEZELLA, the girl who was living with FRANK AGUIAR. She told of the $4,000.00 bribe to the police officers when they raided her apartment as AGUIAR had described, and she told of appellant and BREEN borrowing $16,000.00 to go into the narcotics business. (354-355) She basically said the same things as AGUIAR had, testifying that MATTEO was supplying him with narcotics. (354-362)

On cross examination, she admitted being an addict, heavily dependent on AGUIAR and she also admitted selling drugs in the street. (363-380) She also said she was very much afraid of AGUIAR. In fact, he even used a knife on her (382), although she claimed she still lived with him and yet was not afraid anymore. (404-405).

McCORMACK came back, complaining that six correction officers had attacked him and the Court noted scratches on his shoulders. (49A-50A) He admitted knowing appellant and said he had been in jail for sixteen years. When he was questioned about appellant and narcotics, his answers were unresponsive. When confronted with his Grand Jury testimony, the witness said he had been under heavy sedation when he was beforethe Grand Jury and he had been in intensive psychotherapy for the past eight months at the Adirondacks Correctional Treatment Center. (54A-55A) The witness said he could not recall his Grand

Jury testimony, but the Court held he was wilfully failing to answer questions (58A-59A), and held him in contempt. (61A) There was further colloguy between McCORMACK and the Court and McCORMACK continued to deny his Grand Jury testimony and complain about mistreatment. In fact, the entire McCORMACK episode covered about one hundred pages, one-eighth of the entire trial testimony.

The prosecutor was allowed to impeach his witness by reading the entire testimony taken before the Grand Jury although the witness continually said that he could not recall his testimony, (90A-118A) protesting he was sick (98A), that he wanted to see a doctor and that he was suffering. (98A) He also repeated that when he was in front of the Grand Jury he had been heavily sedated and the records of Kew Gardens Prison would show it.(105A) On cross examination, McCORMACK detailed all of the psychiatric treatment and intensive therapy he had been receiving all during his prison life. (119A-121A)

The prosecution then called Lt. JOHN N. THOMSEN, who described finding MATTEO on September 27, 1972, at 11 Caton Street, East Northport. This was INDIVIGLIA's home, and MATTEO was found unconscious with five bullets in him, a pistol by his side and a large amount in cash in a black case. (123A-127A) There was no objection. (124 A) The money was received in evidence with objection. (526-527) The gun was described and the whole scene gone into in great detail. (130A-132A).

GERALD GRAFFAM, a narcotics agent, described his arrest of the appellant on November 8, 1973, and his transporting him to Suffolk County Police headquarters and then to the Federal offices in Westbury. (547-548) He advised appellant of his rights on the way to the Eastern

District and MATTEO was then brought to the office of Assistant United States Attorney RITCHIE. (549-551,552)

The Assistant, DAVID J. RITCHIE, then testified about the interrogation of appellant in his office, and he related the answers MATTEO gave. RITCHIE asked him if he dealt in junk and MATTEO denied it, saying he was broke. RITCHIE said: "How can you be broke, you have got plenty of money". MATTEO said: "If I had plenty of money, why did I have to borrow $60,000.00 from Frank". (137A) MATTEO also said that the only other people he knew that were dealing in drugs were in West Street. (138A)

JOSEPH THOMPSON, a Suffolk County Detective, also described finding MATTEO when he was shot, and he told the jury of his finding other narcotics implements in the house, even though the Court said it was outside the charge, because appellant's counsel said he did not care. (139A) The implements consisted of scales, bottles and other paraphernalia relating to narcotics activity. (140A-141A) The use of all the different materials was described in detail. (142A-143A), without objection. (144A) The offices was on the premises pursuant to a search warrant directed against the premises and its owner, CHARLES INDIVIGLIA. (145A) The bulk of the materials were found in the bedroom, the attic and the garage. (145A-146A) The government rested and THOMAS MATTEO took the witness stand. He said he was basically a numbers runner and met FRANK AGUIAR in connection with that business. AGUIAR was a patron of the OASIS BAR, a regular stop of MATTEO's and he started placing bets four or five times a week, at least $100.00 each time. (575) He also saw him at other bars and was even at his

apartment a few times. (576)

AGUIAR kept telling him that he was in penny-ante stuff and he should get involved in narcotics like he was.(577) MATTEO never went into it, but continued his numbers running.(578) In 1971, he borrowed $14,000.00 from AGUIAR to go into a partnership in a bar called The Whales College Lounge.(578,581) He was supposed to pay back $18,000.00.(582) He only paid back $3,000.00, and by 1972 still owed $11,000.00, a situation which made AGUIAR very angry.(582) In fact, about a month before he was shot, AGUIAR threatened him with a knife unless he paid the money.(583) There was an actual altercation in which a bystander almost got slashed.(584) A month later, MATTEO was shot. (584) In the meantime, AGUIAR's brother met with him as an intermediary and they decided to expand the lounge, to make enough to make a profit and repay the original loan, and MATTEO said he would need another $50,000.00 or $60,000.00.(585) The brother promised to get back to appellant, and the day before he was shot he called to say that he had spoken to his brother and they agreed that it was a good idea. (587) They agreed to meet at INDIVIGLIA's house at AGUIAR's suggestion. (587) Appellant went there to get the loan, and entered the kitchen where he had coffee with INDIVIGLIA.(588)

INDIVIGLIA told him he really should have paid the money back (588), and then answered the telephone, apparently a call from AGUIAR, and told the caller that MATTEO was there.(589) After some more talk, MATTEO felt like he was hit in the head with a hammer, he heard shots and he fell to the floor.(590) He was unconscious for four days and he

described his treatment, including the extraction of one bullet from his brain, two from his spinal cord and two from his abdomen.(591) He reiterated that he had nothing to do with drugs, only numbers running. (592)

On cross examination, he denied being involved with AGUIAR, INDIVIGLIA or TYLER SOMAS in drugs.(596-597) He also denied having a pistol (599), or seeing any money in INDIVIGLIA's house when he was shot.(600) He explained his conversation with Assistant United States Attorney RITCHIE by saying he told him he was trying to borrow $60,000.00 from AGUIAR, which was true.(601)

MATTEO was then asked if he frequented the Club International and when he replied that he had only been there a few times, he was asked if he knew JOSEPH ABBRUZZO. The name was repeated, the man was described, but appellant said he may have met him, but did not think so.(146A-147A) No explanation was made by the goverment as to ABBRUZZO's connection with the case and no other foundation of any sort was laid. MATTEO also denied knowing anything about the $350,000.00 found near his body.(607-608)

The prosecutor asked appellant if on the way down to be arraigned after his conversation with Assistant United States Attorney RITCHIE he had a conversation with Agent SCHNEPPER(148A). This was the conversation that the trial Judge had already ruled inadmissible on the government's direct case, but now, it could be used in cross examination. (610) Appellant's counsel conceded that the prosecutor could ask the question.(148A)

At any rate, the conversation was that SCHNEPPER said to MATTEO that he was aware MATTEO had done five to ten kilograms at a time, but he wanted to know what INDIVIGLIA was doing, and MATTEO responded that INDIVIGLIA was doing thirty to forty kilos at a time.(148A-149A) MATTEO admitted saying that and also that INDIVIGLIA had lost his European connection, and counsel at no time objected that the statements were prejudicial or even that they were not really even admissions.

The government called JOSEPH AVERSO, in rebuttal, apparently the man referred to as ABRUZZO in the cross examination of appellant, but counsel did not object that the name was not the same. He was then a Federal prisoner serving a three to ten year sentence, having been convicted of two narcotics conspiracies.(626-627)

He was asked to point out MATTEO and he positively and with certainty identified the wrong person, picking out a spectator who turned out to be a police officer. He was asked to look again and then he happened to pick out MATTEO, who was sitting at the counsel table. (150A-152A)

He then told a fantastic story, without objection, of meeting MATTEO at the Club International. MATTEO was drunk and came home with him to sleep at his apartment.(152A-153A) MATTEO told him he made his money in narcotics and the witness said he asked MATTEO if he wanted to buy drugs because he was involved in smuggling heroin into the country. (153A-154A) A few days later , he introduced MATTEO to his partner, BOISE, and at the end of June, 1971, BOISE gave MATTEO a shopping bag full of drugs for a shopping bag full of money.(154A-155A) AVERSO's

testimony was never even objected to.

The Court told the jury that AVERSO's testimony was to be used for credibility purposes (159A-160A), and it said nothing about JAMES McCORMACK or MATTEO's alleged statement to the police officer, except that it had to be voluntary and should be used only to impeach. (745-747)

The jury requested a re-reading of the testimony where MATTEO related his conversation with Agent SCHNEPPER (161A), and then they convicted him. (162A)

Although most of the damaging evidence came in without objection at trial, appellate counsel tried to remedy the matter on sentence by appropriate motions which were entertained but denied.

POINT I

THE READING OF JAMES McCORMACK'S GRAND JURY TESTIMONY TO THE JURY WAS IMPERMISSIBLE. IT ALLOWED APPELLANT TO BE CONVICTED BY OUT OF COURT HEARSAY EVIDENCE, IN VIOLATION OF HIS RIGHT TO DUE PROCESS AND TO CONFRONT WITNESSES.

The only real evidence against appellant was that of FRANK AGUIAR, a self confessed major narcotics dealer, who had made more than $400,000.00 in heroin, whose testimony could possess little credible worth. Added to this was the word of his narcotics addict girlfriend, who he occasionally used his knife on, and who was deathly afraid of him. The only other evidence adduced on the government's case had virtually nothing to do with proving the elements of the crime. The admission made to the United States Attorney, RITCHIE, was not an admission of guilt at all and the finding of appellant's bullet ridden

body, with the money beside it, in a house containing narcotics paraphernalia, was not only highly prejudicial, but it, too, had nothing to do with this case. Probably the most damaging evidence in the whole trial was the Grand Jury testimony of McCORMACK, because it came from a man who was supposedly a friend of appellant, and who the Court intimated to the jury was acting up only to help MATTEO. (58A-61A)

Clearly, in permitting the prosecutor to read to the jury each and every question propounded and answered in the Grand Jury, even though the witness could not recall them and he claimed to have been under sedation when he gave the testimony, was to, in effect, allow the jury to consider the evidence for its truth. The witness kept complaining that he was sedated due to mental illness and detailed his long history of psychiatric treatment.(54A-55A,119A-121A) At one point he said that the prison records at Kew Gardens, where he had been apparently housed before being taken the the Grand Jury, would prove the sedation (105A), yet no attempt was made to ascertain the truth. The witness' mental history should have made the Court refuse to permit the lengthy reading of Grand Jury testimony (469-497), since that condition alone made it suspect. This was not a situation where a witness could not recall his testimony at the time he testified on trial, but averred that it was true when he was before the Grand Jury. It was, rather, an instance where he directly attacked his prior testimony, and this case again presents the unheard of situation where a whole line of questions and answers was permitted to be read rather than a short identification previously made, such as in United States v. DeSisto, 329 F.2d 929,933 1964.

It has always been recognized that the long established rule is that prior inconsistent statements, regardless of their nature, are never allowed into evidence except for the purpose of impeachment. Bridges v. Wixon, 326 U.S. 135, 153-154 (1945). That rule was recognized by this Court in United States v. DeSisto, supra, as well as most commentators, McCormick Evidence 75-79 (1954), although it has been criticized in many quarters. The rule has also been followed in most jurisdictions, and no distinction has been made as to whether the prior hearsay testimony consisted of statements or evidence given before a Grand Jury. Grunewald v. United States, 353 U.S. 391 (1957); Cannady v. United States, 351 F.2d 796 (D.C. Cir. 1965); United States v. Dobbs, 448 F.2d 1262 (9th Cir. 1971); United States v. Washabaugh, 442 F.2d 1127 (9th Cir. 1971); United States v. Gregory, 472 F.2d 484, (4th Cir. 1973); United States v. Johnson, 427 F.2d 957 (5th Cir. 1970); Lerma v. United States, 387 F.2d 187 (8th Cir. 1968), cert. den. 391 U.S. 907; United States v. Miles, 413 F.2d 34 (3rd Cir. 1969), appealed after remand 468 F.2d 482; United States v. DeCarlo, 458 F.2d 358 (3rd Cir. 1972).

As we have mentioned, this Court has pointed out in DeSisto that the rule has been criticized in many quarters. We think, however, that much of the criticism has come from commentators such as McCormick, who have criticized the rule soley on the basis of the idea that a man's earlier testimony could many times be more accurate than his later testimony because generally people remember better at a time closer to the happening of an event. This reasoning may have merit in the

abstract, but not one of the commentators recognized that other factors are much more important to preserve our inherent system of personal freedom, which includes the concept of a man being convicted only upon testimony that he is confronted with. People who criticize the rule do not take into account that the possibility of having false testimony introduced by an unscrupulous police officer or prosecutor exists to a much greater degree at the Grand Jury level than it does at any other time. When a person alleges, such as in the case at bar, that his testimony was untrue or that he was forced or wrongfully induced to give that testimony, the principle of having a lawyer present at the time the testimony is given becomes significant. The idea that a man's testimony might be more truthful upon the occasion when he gives evidence before a Grand Jury holds no merit. I am sure that this Court is aware that in many sections of our country there are movements to eliminate Grand Juries completely, on the grounds that they waste time and are a needless expense. In any event, whether one agrees with this idea or not, one can still recognize that there is substantial backing for such a movement, and that to a large extent the idea that Grand Juries do not perform a useful function has some merit. Inherent in this argument is the fact that Grand Juries usually hand down indictments whenever the prosecutor desires, and that witnesses generally will testify in a manner favorable to the prosecution, especially with intelligent prodding or direction on the part of law enforcement. Many people think that Grand Juries do not serve a valid purpose. Cer-

tainly the testimony induced before a Grand Jury should not have greater weight than any prior statements.

At any rate, this issue boils down to a determination of whether the exception granted in Desisto applies to the case at bar. In the Desisto case, this Court recognized the general rule and recognized that proof of an out of court statement was generally not admissible except for impeachment purposes. An exception was granted, however, with respect to trial testimony or testimony before a Grand Jury, and in that case the evidence was admitted for its truth. It should be noted, however, that a significant factor in that case was that the evidence adduced before the Grand Jury was merely an identification of a photograph of the defendant. United States v. Desisto, supra, Page 932. Desisto did not deal with Grand Jury testimony such as is present in this case, and Desisto did not deal with a situation where the witness himself said that his prior testimony was untrue or improperly coerced. These are differences which appellant contends control the case at bar and make the Desisto exception inapplicable. This Court recognized the exception in Desisto in United States v. Briggs, 457 F.2d 908 (2nd Cir. 1962), although that case only dealt with statements rather than Grand Jury testimony. Again, in United States v. Cunningham, 446 F2d 194 (2nd Cir. 1971), cert. den. 404 U.s. 950, the exception was recognized. That case, like Briggs, did not involve Grand Jury testimony. Again, in United States v. Pacelli, 470 F.2d 67 (2nd Cir. 1972) it was made clear that the Desisto exception was not intended to be extended. That case also involved a statement given to

police rather than testimony before a Grand Jury.

The only case that specifically involved Grand Jury testimony was United States v. Insana, 423 F.2d 1165 (2nd Cir. 1970), cert. den. 400 U.S. 841, and we find the reasoning in that case merely points up the differences between the Desisto situation and the case at bar. In Insana, this Court said that certain situations could be present where a witness in good faith asserts that he cannot remember relevant events or that for some reason, such as a desire not to testify against someone, the witness refuses to testify, but he implicitly admits the truth of the extra-judicial statement harmful to the defendant. United States v. Insana, supra, 1170. The Court then said:

> "Thus we believe that these statements are admissible not only to impeach his claim of lack of memory, but also as an implied affirmation of the truth. This conclusion is consistent with our qualification of the hearsay concept set forth in United States v. Desisto ..."

Emphasis added, citation omitted. United States v. Insana, supra, 1170.

We believe that the Insana holding makes it clear that the intent of this Court was to allow Grand Jury testimony to be used only in situations where no issue was created regarding its truth or the method by which it came into being. Nothing could be clearer than this Court's statement that:

> "Where, as here, a recalcitrant witness who has testified to one or more relevant facts indicates by his conduct that the reason for his failure to continue to testify is not a lack of memory but a desire 'not to hurt anyone', then the court has discretionary latitude in the search for truth, to admit a prior sworn statement which the witness does not in fact deny he made."

United States v. Insana, supra, at 1170.

The case at bar clearly comes within the idea that Insana conveys. The case at bar involved a direct and substantial issue that the testimony in the Grand Jury was not true, that the witness could not recall it and that he was heavily sedated and mistreated when he testified. In addition, in the case at bar, the Grand Jury testimony involved a substantial amount of questions and answers and was read at great length by the prosecutor. None of the cases which this Court has decided which permitted the use of Grand Jury testimony involved these issues. Even in Desisto itself, the only Grand Jury testimony that was involved was a simple identification of the defendant. That identification was also made in the prior trial, so that no real issue of the truth of the Grand Jury testimony was presented. The facts of Desisto and several other cases do not resemble the facts in this case, and the prejudice and dangers inherent in allowing Grand Jury testimony for its truth in a situation where the witness himself attacks that truth, is clearly indicated.

In the case at bar, the prosecutor even knew what would happen because McCORMACK had made his intentions clear before the trial and was already acting up when the openings began. (161A,131)

POINT II

THE REUBTTAL TESTIMONY OF THE GOVERNMENT WENT FAR BEYOND PERMISSIBLE LIMITS, WAS IRRELEVANT AND SHOWED THE JURY ANOTHER CRIME WITH WHICH APPELLANT WAS NOT CHARGED.

When appellant testified, he was asked some very innocuous questions in cross examination by the prosecutor. He was simply asked

if he frequented the Club International and knew a JOSEPH ABBRUZZO. (146A-147A) Appellant replied that he was there a few times, but said that he did not know ABBRUZZO. The prosecutor described the man as, "A guy about 5'8", rather lean, very nervous?", and the appellant said he did not know him, but admitted that he may have, he did not know. (147A)

No further foundation was laid, when all of a sudden, like a bombshell, on rebuttal, one JOSEPH AVERSO, took the witness stand. Not only was his name different, but when asked if he could identify appellant, he picked out a spectator, with great certainty, who turned out not to be MATTEO, but a Suffolk County cop. (150A-152A) Then AVERSO was told to look again and this time, with equal but prompted sureness, he identified the man at the counsel table, appellant. (152A)

The witness was then permitted to say not only that he had known appellant from the Club International, but that he stayed at his house and purchased a large amount of heroin from his partner for a lot of money a few days later. (154A-155A) The witness described the events and conversations in great detail, even though appellant was never charged with that crime.

Appellant recognizes that the Trial Court has great discretion in premitting the reception of rebuttal testimony, yet, it is equally recognized that rebuttal should only explain or contradict evidence offered in defense. United States v. Greenberg, 268 F.2d 120 (2nd Cir. 1959); United States v. Crowe, 188 F.2d 209 (7th Cir. 1951).

Still, rebuttal which contains little value with reference to issues in dispute should never be permitted where it shows evidence of

other crimes. United States v. Tramaglino, 197 F.2d 928, cert. den. 344 U.S. 864 (2nd Cir. 1952); United States v. Chiarella, 184 F.2d 903, modified 187 F.2d 12, reargument denied, 187 F.2d 870, vacated 341 U.S. 946, cert. den. 341 U.S. 956 (2nd Cir. 1950); United States v. Kahaner, 317 F.2d 459, cert. den. sub nom Corallo v. United States, 375 U.S. 835, Keogh v. United States, 375 U.S. 836, reh. den. 375 U.S. 926, 375 U.S. 982 (2nd Cir. 1963); Helton v. United States, 221 F.2d 338 (5th Cir. 1955).

In United States v. Kahaner, supra, at 471-472, this Court, speaking through Judge Friendly, said that although the scope of rebuttal is largely discretionary, a Trial Court should exclude evidence showing the commission of other crimes:"'Where the minute peg of relevancy will be entire obscured by the dirty linen hung upon it'"

The statement of Judge Friendly applies even more aptly to this case than the one concerning which it was made. To allow a witness to detail a major narcotics transaction concerning which no charges were ever brought, just because appellant could not recall if he ever met the man, is ridiculous. The situation becomes even more ludicrous when one realizes that appellant would have honestly denied knowledge since the man's name was incorrectly pronounced by the prosecutor, the appellant was not sure he did not know him and no foundation questions whatsoever were asked. When the added fact of witness' misidentification is added, his testimony could have no reasonable relevance to this case, except to prove another crime and seriously prejudice the jury.

POINT III

APPELLANT'S STATEMENT, ALREADY RULED INADMISSIBLE, SHOULD NOT HAVE BEEN PERMITTED.

After appellant made a statement in the United States Attorney's office, one which in no way was an admission of narcotics transactions, he indicated a desire not to answer any further questions. Thus, the Court ruled that his conversation with Agent SCHNEPPER, on the way to the arraignment, was inadmissible. (133A-136A) The conversation came out on cross examination, when appellant testified, but most of it was a statement of fact by the agent, and as such, it should not have been allowed.

The agent told MATTEO that he, SCHNEPPER, knew MATTEO had done five to ten kilograms at a time and he wanted to know how many INDIVIGLIA, not a defendant at this point in the trial when the response was elicited, had done. MATTEO replied that INDIVIGLIA was doing thirty to forty kilos at a time (148A-149A), and that Indiviglia had lost his European connection. This statement in no way was an admission of guilt of the crime charged, it only showed knowledge of INDIVIGLIA's activities, and it was not in rebuttal or opposition to anything MATTEO said on direct examination. Even though statements such as this one, obtained in violation of Miranda v. Arizona, 384 U.S. 436 (1966), have been permitted on cross examination under certain circumstances, that idea is not universally accepted, and even where it is, it must impeach credibility by being contrary to something testified to on direct. Harris v. New York, 401 U.S. 222 (1971)

The rule prior to Harris was that statements in violation to Miranda were inadmissible for any purpose. Bosley v. United States, 426 F.2d 1257 (D.C. Cir. 1970); Groshart v. United States, 392, F.2d 172 (9th Cir. 19[illegible] Harris seemed to change this in a one paragraph statement decided by a six to three majority, yet even the majority recognized its use was to contradict inconsistencies uttered from the witness stand. The dissent pointed out that Walder v. United States, 347 U.S. 62 (1954) did not compel the majority holding, but even so, it did not apply where the statement went to the issue to be proven rather than one of a collateral nature. Harris v. New York, supra, 228-229. Thus, the harm of avoiding Miranda would not be so burdensome where the statement came in on a collateral issue such as to controvert a statement that two years before the defendant never dealt in narcotics at all, as was the situation in Walder. Where it comes in on the issue to be proven, not in response to a contrary claim by the defendant, it can only counter the spirit of Miranda itself and do by indirection what could not be done directly. In that way, the deterrant to unlawful police conduct is lost. Harris v. New York, supra 231; United States v. Blocker, 354 F. Supp. 1195 (D.C. Cir. 1973)

Here, the appellant never testified with relation to Indiviglia. He was not a defendant and the statement was not relevant. In addition, the conversation consisted of more of a statement by SCHNEPPER than MATTEO, and its introduction was not to impeach anything appellant had said on direct because he had not even testified in that area. Harris did not hold that just because a defendant testifies, anything he ever said could be brought out. Harris held that the statements

could be used to impeach the credibility of the defendant who had just given testimony which was inconsistent with the statements brought out on cross examination.

Here the statement was simply introduced on cross examination not in contradistinction of anything appellant had said on direct but rather for the value of the contents of the statement itself.

Its only purpose was not to impeach but to intimate to the jury that if the appellant knew of INDIVIGLIA's activities, he must have been involved himself. In this manner, the evidence came in directly on the issue of guilt, a happening which is not permitted by Harris or any other authority since.

This was a most important piece of evidence, since the jury called for it to be reread and then promptly convicted appellant. (161A)

POINT IV

APPELLANT'S RIGHT TO THE EFFECTIVE ASSISTANCE OF COUNSEL WAS NOT PROTECTED.

There can be no argument that the right to counsel under the Sixth Amendment contains the right to effective representation. Avery v. Alabama, 308 U.S. 444 (1969); Barber v. Nelson, 451 F.2d 1017 (9th Cir. 1971) The only question that must be answered in each case is whether the representation afforded so violates minimum standards that the Trial Court must take notice of the trial being a mockery as far as the defendant is concerned. United States ex rel Pugach v. Mancusi, 310 F.Supp 691, aff'd. 441 F.2d 1073, cert. den. sub nom Pugach v. McGinnis, 404 U.S. 849 (S.D.N.Y. 1970); Fimmand v. United States, 308 F.Supp. 938 (S.D.N.Y. 1970); United States v. Steed, 465 F.2d 1310, cert. den. 409 U.S. 1078 (9th Cir. 1972)

It has also been recognized that errors can be so great as to deny due process, even when retained counsel is involved, even though the standards may be more stringent. United States ex rel Pugach v. Mancusi, supra; Fimmand v. United States, supra; Arrastia v. United States, 455 F.2d 736 (5th Cir. 1972); Wilson v. Phend, 417 F.2d 1197, appeal after remand 457 F.2d 106, cert. den. 409 U.S. 881 (7th Cir. 1969); Blanchard v. Brewer, 429 F.2d 89, cert. den. 401 U.S. 1002 (8th Cir. 1970); United States ex rel O'Brien v. Maroney, 423 F.2d 865 (3rd Cir. 1970)

In the case at bar, the representation afforded was devoid of any degree of competence.

There was no objection whatsoever to the government's extensive use of the Grand Jury testimony of JAMES McCORMACK, no attempt to keep it out, or at the very least, seek limiting instructions. There was no objection to the rebuttal witness, JOSEPH AVERSO, to any of his testimony or even a claim that other crimes were being shown. There was no objection to the government's use of appellant's conversation with Agent SCHNEPPER, but rather, counsel indicated that he thought the prosecutor could ask the question. Here, too, at the very least, no limiting instructions were sought, nor were specific charges asked for with relation to the evidence or the use which the jury could make of McCORMACK's Grand Jury testimony. It is not impossible to surmise that when counsel put MATTEO on the witness stand, he had no idea that the government could even try to get into the area of MATTEO's conversation with the agent.

There was no attempt to keep out proof of the shooting of MATTEO and the $350,000.00 found near his body, an event that had nothing to do with this case, and must have been highly prejudicial. In fact, the attorney first brought the matter into the trial when he was cross examining FRANK AGUIAR.(237-248) When appellate counsel brought this out on sentence, the Court remarked that trial counsel had wanted it in the case. Then, although the damage had been done, no objection was interposed when the government put on police witnesses to describe how MATTEO was found (139A-144A), or to a complete detailing of all the narcotics paraphernalia found in INDIVIGLIA's house, which had nothing to do with the case. In fact, all the items were received in evidence without objection.(144A) There was no attempt to prevent the revelation that a gun was found next to MATTEO, and no attempt was made to prevent the money from coming in.(128A-129A)

In short, not one single objection of substance was raised which seemed to protect appellant's rights or preserve the record.

Appellant must just have well gone to trial pro se. At least then, the Court would have helped him.

CONCLUSION

THE JUDGMENT SHOULD BE REVERSED AND A NEW TRIAL ORDERED.

Respectfully submitted,

PREMINGER, MEYER & LIGHT
Attorneys for Appellant
66 Court Street
Brooklyn, New York 11201

STANLEY M. MEYER
Of Counsel

Service of ~~three (3)~~ Two (2) copies of the within
Brief is hereby admitted
this 17th day of December 1974
Charles L. Woodward
.....
Attorney(s) for by Courtlandt Dowling (Secretary)